IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2006

CORAM :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

Writ Petition Nos.7162 to 7167 of 2002

A.Gunasekaran .. Petitioner in W.P.No.7162 of 2002
S.Manickavasagam .. Petitioner in W.P.No.7163 of 2002
S.Chandrakanth .. Petitioner in W.P.No.7164 of 2002
B.Srinivasa Rao .. Petitioner in W.P.No.7165 of 2002
V.Annadurai .. Petitioner in W.P.No.7166 of 2002
C.Ayyaraj .. Petitioner in W.P.No.7167 of 2002

-Vs-

1.The Customs Excise and Gold (Control)
Appellate tribunal, Shastri Bhavan
Annexe, 1st Floor, 6
Haddows Road
Chennai - 6
2.The Commissioner of Customs (Sea)
Custom House, 33, Rajaji Salai
Chennai - 1. .. Respondents in all W.Ps

Writ Petition in W.P.No.7162 to 7167 of 2002 are filed under Article 226 of the Constitution of India praying for the relief of issuance of a Writ of certiorari to call for the records relating to the order passed by the first respondent in final order Nos.2055/2001 (C/Appeal No.394/2000), 2052/2001 (C/Appeal No.391/2000), 2054/2001 (C/Appeal No.393/2000), 2051/2001 (C/Appeal) No.390/2000), 2053/2001 (C/Appeal No.392/2000) and 2056/2001 (C/Appeal No.395/2000) respectively dated 21.12.2001 and quash the same as unsustainable, arbitrary and unlawful.

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For Petitioner in W.P.No.7162 of 2002 : Mr.K.Jayachandran
For Petitioners in W.P.Nos.7163 to 7167 of 2002 : Mr.A.Chandrasekaran

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For Respondents : Mr.V.T.Gopalan,Addl.Solicitor General assisted by Mr.P.Wilson,Asst.Solicitor General.

O R D E R

In these writ petitions, the petitioners have challenged the order dated 21.12.2001 passed by the first respondent - Customs, Excise and Gold (Control) Appellate Tribunal.

2. As all the writ petitions are filed seeking for an identical relief, for the sake of convenience, the first writ petition in W.P.No.7162 of 2002 is taken up for discussion.

3. The case of the petitioner is that the petitioner is an importer of second hand printing machines. As per the import policy then obtaining, the import of used printing machinery by actual user could be done without licence subject to the condition that the importer shall not sell the machinery within five years after the date of import and the machinery imported should also be manufactured within five years from the date of import. If the importer wants to sell the imported machinery, that could be done only after obtaining permission from the Director General of Foreign Trade. Under the above statutory parameters, during the relevant period of time. the individual importers have imported 209 machineries by filing individual bill of entry and by clearing the goods from the Customs Authorities individually.

4. The second respondent - Commissioner of Customs (Sea) initiated action against the petitioner as if the petitioner was the person behind the import of those 209 machineries and all individual importers were only named lenders. After a thorough enquiry, the Commissioner of Customs passed an order for release of 103 second hand printing machineries found in different godowns with a condition that the importer should give an undertaking to instal the same in the imported premises and would not sell the same, but would use them as per the actual user conditions. In respect of 91 machineries, which were already stated to be sold, the Commissioner; passed order for confiscation. As the machinery were not available for confiscation, in lieu of confiscation, fine in a sum of Rs.56 lakhs was imposed apart from personal penalty of Rs.25 lakhs on the petitioner.

5. In respect of that portion of the order, which went against the petitioner, an appeal was carried by the petitioner to the first respondent - Customs, Excise and Gold (Control) Appellate Tribunal

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and the Appellate Tribunal on 21.12.2001 has passed an order setting aside the entire order of the first respondent and remitted the matter back to the Commissioner of Customs to consider the matter afresh with a direction to keep in mind the law laid down in the certain judgment referred by the Tribunal in its order and with a further direction not to go by the facts in certain cases of similar nature goods were allowed to be cleared on imposing redemption duty with nominal fine.

6. The other writ petitions are also filed by individual petitioners in respect of that portion of the order of imposition of penalty on them in the very same order of the Tribunal.

7. Learned counsel appearing for the petitioners has very strenuously contended that as per Section 129-A of the Customs Act, the order of Commissioner of Customs - second respondent is appealable to the first respondent - Appellate Tribunal. Invoking the said provision, the petitioner has filed an appeal to the Appellate Tribunal in respect of the portion of the order, which went against the petitioner. However, the Tribunal, in total disregard to the statutory provisions, has set aside the whole of the order and remitted the matter back to the Commissioner of Appeals to re-consider the issue, that too, by giving certain guidelines, which is impermissible in law.

8. However, the learned Additional Solicitor General appearing for the respondents has pointed out that the impugned order was passed in the year 2001. During the relevant time, there was a provision for reference to the High Court on a particular question of law. If the reference has not been made by the competent authorities, it is open to the petitioner to straight away file a petition to get the matter referred. On such application, if the Court is satisfied about the existence of question of law, the Could would direct the respondent to frame the question of law and forward it for the opinion of the Court. That has to be considered by a Division Bench for an authoritative opinion. That course has not been adopted by the petitioner. At present, even an appeal is provided to the High Court. Without following the statutory provision, filing a writ petition cannot be regarded as a proper approach and the writ petition has to be dismissed without going into the merits of the case. He further contended that the authorities are having in their possession statements recorded under Section 108 of the Customs Act against the petitioner. The Supreme Court has considered and rendered a decision about the evidentiary value of such statements. Thus, there is absolutely no case for the petitioner to argue in this case.

9. I heard the argument of the learned counsel on either side and perused the material on record.

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10. Section 129-A of the Customs Act proceeds as follows:

> "Appeals to the Appellate Tribunal: - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -
>
> (a) a decision or order passed by the Commissioner of Customs as an adjudicating authority;
>
> .....
>
> (the other sub-clauses in clause (1) and clause (2) are not relevant to the case on hand and hence not extracted.)
>
> .....
>
> (3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Commissioner of Customs, or as the case may be, the other party preferring the appeal.
>
> (4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate tribunal as if it were an appeal presented within the time specified in sub-section (3).
>
> (5) The Appellate tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.
>
> (6) ......
>
> (7) ......
>
> (As clauses No.6 and 7 are not relevant to the case on hand, they are not extracted)

11. As per Clause (1) of Section 129A of the Customs Act, the aggrieved person has to file an appeal to the Appellate tribunal within three months, as stipulated in Clause (3). On receipt of notice that an appeal has been preferred under this Section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in such manner as may be specified by rules made in this behalf against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Trib8unal as if it were an appeal presented within the time

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specified in sub-section (3).

12. But in this case, it is obvious that in respect of that portion of the order of the second respondent, which went against the petitioner i.e., in respect of 91 machineries, which were not available, for which an order of imposition of redemption fine in a sum of RS.56 lakhs in lieu of confiscation and further imposition of personal penalty in a sum of Rs.25 lakhs, the petitioner filed the appeal. In respect of other portion of the order, which was rendered in favour of the petitioner, there was no appeal before the Tribunal at the instance of the petitioner. The respondent - Department also did not think fit to file an appeal against that portion of the order in respect of 109 machinery rendered in favour of the petitioner either independently or atleast to file across objection on the petitioner's appeal. In the absence of any appeal or cross appeal at the instance of the second respondent, the interference by the Tribunal in that regard is not only uncalled for, unwarranted but against the statutory provisions of appeal.

13. In respect of the contention raised by the learned Additional Solicitor General that the writ petition cannot be maintained, this Court is of the view that the writ petition can very well be maintained in the case on hand. The existence of adequate or suitable alternative remedy could be regarded as a factor and could be considered while entertaining an application under Article 226 of the Constitution of India for exercising the jurisdiction to issue writ. But the existence of such remedy would not impinge upon the jurisdiction of the High Court to deal with the matter itself, if it is in a position to do so on the basis of the averments made in the affidavit filed. Even when an alternative remedy has been availed by a party and not pursued, and rather withdrawn, the party could prosecute proceedings under Article 226 for the same relief or for rather a larger relief. In this case the writ petitions were filed and entertained by this Court in the year 2002 and are pending for the past four years for consideration of this Court by granting interim orders. Hence, I am of the view that the petitioner need not be relegated to the statutory remedy. Useful reference can be had to the judgment of the Supreme Court in the case of S.J.S.BUSINESS ENTERPRISES PRIVATE LIMTIED VS. STATE OF BIHAR AND OTHERS reported in (2004) 7 SCC 166.

14. The other point whether the Tribunal was right in giving directions to the second respondent to consider the case in a particular manner while remitting the case, I am of the view that such a direction cannot be legally given to the original authority - the second respondent, who is exercising quasi judicial function. The authority under the Act is entitled to complete the proceedings as he thinks fit in exercise of his judgment and according to his understanding of the law and facts. For this purpose, he can take the

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assistance and support of any order or judgment which has presidential value and all other and every material placed before it for the purpose of adjudication and has to decide the matter with his own wisdom. The appellate authority cannot impose or super-impose his view over the original authority to do quasi judicial adjudication in a particular manner. The authorities under the Act have to apply their mind on the basis of the material furnished by the party like the petitioner and then pass orders. Useful reference can be had to the judgment of the Supreme court in AIR 1998 SC 287 (UNION OF INDIA AND OTHERS VS. TATA ENGINEERING & LOCOMOTIVE CO. LTD. ETC.).

15. Hence, the order of the Tribunal in respect of that portion of the remittal order with regard to 109 machineries is hereby set aside. In respect of the rest of the machineries, the second respondent - Commissioner is hereby directed to proceed further in accordance with law, without being influenced by any of the directions given by the first respondent - Tribunal and pass orders on merits on the basis of the material and documents filed by the parties concerned.

16. With the above observation, the writ petition in W.P.No.7162 of 2002 is disposed of. The other writ petitions are also disposed of in terms of the above observation. However, there is no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

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  Annexe, 1st Floor, 6
  Haddows Road
  Chennai - 6

2.The Commissioner of Customs (Sea)
  Custom House, 33, Rajaji Salai
  Chennai - 1.

+1cc to Mr.K.Jayachandran, Advocate Sr 63414
+1cc to Mr.P.Wilson, Asst. Solicitor General of India Sr 63432

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km/29.12.

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